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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963 No. 810

FRANCES H. SELIGSOHN,

Petitioner,

and

EXPORT-IMPORT CLOTHING CO.

v.

THE PHILADELPHIA PARKING AUTHORITY, CITY STORES COMPANY, and STRAWBRIDGE & CLOTHIER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENTS IN OPPOSITION

HARRY SHAPIRO,
DAVID N. BRESSLER,
306 South 19th Street,
Philadelphia 3, Pennsylvania.
Attorneys for Respondent, The Philadelphia Parking Authority.

SAMUEL D. GOODIS,
BERNARD M. GUTH,
1315 Walnut Street,
Philadelphia 7, Pennsylvania.
Attorneys for Respondent, City Stores Company.

JOHN R. McCONNELL,
OSCAR M. HANSEN,
2107 Fidelity-Philadelphia Trust Building,
123 South Broad Street,
Philadelphia 9, Pennsylvania.
Attorneys for Respondent, Strawbridge & Clothier.

Of Counsel:
SHAPIRO, ROSENFELD, STALBERG & COOK,
FOLZ, BARD, KAMSLER, GOODIS & GREENFIELD,
MORGAN, LEWIS & BOCKIUS,

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QUESTIONS PRESENTED.

1. Whether this Court should grant certiorari to review the state court's conclusion that a public rather than a private purpose was involved in the respondent Parking Authority's condemnation of real estate, including petitioner's property, for a public parking project to be operated by the respondent department stores under a rental lease from the Authority, where the stores are required by the lease to operate the project as a *public* parking facility, title to the project is to be in the Authority, and the operation of the project by the stores is to be at rates fixed by the Authority and subject to the rules and regulations of the Authority.

2. Whether this Court should grant certiorari because of the petitioner's contention that the state court failed to make an independent judicial review of the question whether the respondent Authority's condemnation was for a private rather than a public purpose, where petitioner did not make this contention in the state court and, in addition, the record clearly shows that the state court did make an independent judicial review of such question.

STATEMENT OF THE CASE.

1. The Proceedings Below.

This was an action commenced by the filing of a complaint in equity in Court of Common Pleas No. 5 of Philadelphia County, Pennsylvania, on March 28, 1962 by plaintiff Frances H. Seligsohn (petitioner here), as owner of a lot and building at the northeast corner of 8th and Filbert Streets in the City of Philadelphia, and by her co-plaintiff lessee, Export-Import Clothing Co., which operated a store in the building for the sale of economy-priced wearing apparel.

The complaint sought permanently, but not preliminarily, to enjoin one of the defendants, The Philadelphia Parking Authority (a respondent here) from condemning

plaintiffs' property or any other property in connection with the Authority's proposed public parking project at 8th and Filbert Streets, and to enjoin the Authority and the other two defendants, City Stores Company and Strawbridge & Clothier (also respondents here), from performing a pre-lease agreement dated June 26, 1960 and a lease agreement executed on or about March 1, 1962, but dated as of January 1, 1962, under which the Authority leased the parking project to defendant City Stores Company and defendant Strawbridge & Clothier for operation as a public parking facility.

The defendant Authority is a body corporate and politic created, existing and acting under the Parking Authority Law of the Commonwealth of Pennsylvania (Act of June 5, 1947, P.L. 458, as amended; 53 Purd. Stat. Ann. §§ 341 et seq.), and an Ordinance of the Council of the City of Philadelphia approved on January 11, 1950. The defendant City Stores Company, a Delaware corporation, owns and operates Lit Brothers Department Store, located on the east side of 8th Street between Market and Filbert Streets, Philadelphia. The defendant Strawbridge & Clothier, a Pennsylvania corporation, operates a department store under that name on the west side of 8th Street between Market and Filbert Streets.

The defendants filed answers to the complaint, and the plaintiffs filed a reply. Thereafter, the cause was heard between June 11 and June 20, 1962 before the Honorable Eugene V. Alessandroni, President Judge of the trial court, sitting as Chancellor.

On December 26, 1962 the Chancellor filed an adjudication containing 59 findings of fact, 6 conclusions of law, and a full discussion, together with an order for the entry of a decree nisi dismissing the complaint. (A copy of the Chancellor's adjudication, order and decree nisi will be found in Appendix "B" to the Petition, at pages 5a-18a.)

The plaintiffs filed 261 exceptions to the Chancellor's rulings, findings and conclusions as set forth in the adjudication and decree nisi. The exceptions were argued before

the trial court en banc on December 15, 1962, and on January 23, 1963 the court en banc, per the Honorable Theodore L. Reimel, J., filed an opinion and order dismissing the exceptions and entering the decree nisi as the final decree. (A copy of the opinion and order of the trial court en banc will be found in Appendix "B" to the Petition, at pages 19a-23a.)

Thereafter, plaintiff Seligsohn, but not her co-plaintiff Export-Import Clothing Co., appealed to the Supreme Court of Pennsylvania, which on February 11, 1963 filed its per curiam opinion and order, affirming the final decree of the trial court. *Seligsohn* v. *Philadelphia Parking Authority*, 412 Pa. 372, 194 A.2d 606 (1963). (A copy of the per curiam opinion and order of the Supreme Court of Pennsylvania appears in Appendix "B" to the Petition, at pages 24a-27a, and a copy of the dissenting opinion is printed at pages 28a-29a thereof.) Seligsohn filed a petition for reargument in the Supreme Court of Pennsylvania, which that court denied on November 13, 1963 without opinion. (A copy of the petition for reargument is printed as Appendix "A" to this brief, at pages 16-23.).

On February 6, 1964 Seligsohn filed her petition with this Court for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania, asserting a violation of her rights under the Fourteenth Amendment to the Constitution of the United States in that her property was allegedly condemned for a private rather than a public purpose and in that the courts below allegedly failed to make an independent judicial inquiry into the question whether the condemnation was for a public or a private purpose.

2. The Factual Background.

On or about March 1, 1962, the three respondents executed a lease, dated as of January 1, 1962 (Exhibit P-24), under which the respondent Authority was the lessor and respondents City Stores Company and Strawbridge & Clothier (the department stores) were the lessees

(Finding of Fact No. 34 (page 10a);* Complaint, Par. 9 (page 33a)). The basic concept of financing the public parking project through a lease with department stores and the issuance of revenue bonds secured by the lease rentals, came from two similar public parking projects in Pittsburgh, Pennsylvania, both involving the Pittsburgh Parking Authority, one with the May Company (which operates the Kaufmann Department Store), and the other with Joseph Horne's Department Store. (Finding of Fact No. 20 (page 8a)).

Under the terms of the lease here involved, a public parking garage, to be constructed by the respondent Authority in the vicinity of 8th and Filbert Streets, Philadelphia,† was leased by the respondent Authority to the respondent department stores, the lessees agreeing to operate the project as a public parking facility (Finding of Fact No. 37 (page 10a); Exhibit P-24, Par. 4) with a capacity of approximately 950 cars (Finding of Fact No. 38 (page 10a); Exhibit P-24 at page 27). Title to the project was to be in the Authority, and ultimately vest in the City of Philadelphia (Finding of Fact No. 41 (page 11a); N.T. 382, 384). The project was to be a *public* parking garage, open to all members of the public indiscriminately. (Finding of Fact No. 37 (page 10a); Exhibit P-24 at pages 10 and 11).

The estimated cost of the public parking project was approximately $4,500,000 (Finding of Fact No. 8 (page 6a)), to be financed entirely through revenue bonds of the Authority, without cost to the City of Philadelphia or the Authority (Finding of Fact No. 42 (page 11a); N.T. 382, 384).

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* Page references herein with the suffix "a" are to the pages of the appendices to the petition for writ of certiorari, unless otherwise indicated.

† The selection of this site for the public parking project was in line with traffic and parking surveys made in 1957-58 and 1961 by Wilbur Smith and Associates and National Garages, Inc., specialists in this field. (Findings of Fact Nos. 9-17 and 26-30 (pages 7a, 9a)).

On or about February 28, 1962, the Authority and the Provident Tradesmens Bank and Trust Company, as trustee, entered into and executed a Trust Indenture dated as of January 1, 1962, covering an initial issue of $4,500,000 principal amount of the Authority's revenue bonds to finance the public parking project (Finding of Fact No. 43 (page 11a); Exhibit P-19). The security for the bonds was the rental obligation of the respondent department stores under the lease (Finding of Fact No. 44 (page 11a); N.T. 346). This security was necessary because bonds of the Authority, unsupported by the rental obligation of two lessees of high financial standing (i.e., the respondent department stores), would not have been saleable (Finding of Fact No. 45 (page 11a); N.T. 347, 353-354, 364). The credit and earning power of the Authority alone would not have been sufficient to support the sale of the bonds (Finding of Fact No. 46 (page 12a); N.T. 353-354, 355, 356, 363).

Prior to the institution of this litigation, revenue bonds of the Authority in the amount of $4,500,000 went on the market on January 1, 1962, were sold during the month of February, 1962, and were delivered on March 1, 1962 (Finding of Fact No. 56 (page 13a); N.T. 346, 349). Funds in the amount of $4,500,000 received from the sale of the revenue bonds were deposited with the trustee, with interest running in accordance with the Trust Indenture (N.T. 464), and these funds were used to pay for the acquisition of land and other expenses in connection with the construction of the public parking project (Finding of Fact No. 58 (page 13a); N.T. 464).

On February 23, 1962, the Authority adopted a resolution condemning properties in the vicinity of and to the north of 8th and Filbert Streets, Philadelphia, for the purpose of acquiring land for the public parking project (Finding of Fact No. 48 (page 12a)); and on March 6, 1962, the Authority filed a petition and rule, as of Philadelphia Common Pleas Court No. 3, December Term, 1961, No. 4618, for leave to file a condemnation bond (Finding of

Fact No. 48 (page 12a); Complaint, Par. 5 (page 32a)).* As previously noted, the properties thus condemned by the Authority included the one on the northeast corner of 8th and Filbert Streets owned by petitioner and leased by her to Export-Import Clothing Co. (Finding of Fact No. 49 (page 12a); Complaint, Par. 4 and 5 (pages 32a, 33a); N.T. 11).

At the time of the trial, title to all of the condemned real estate, including that which had been petitioner's, was vested in the Authority (Finding of Fact No. 50 (page 12a); N.T. 464), which was then in the process of acquiring possession of all of the condemned property (Finding of Fact No. 55 (page 13a); N.T. 465). The Authority had also settled with a majority of owners (in numbers, value and area) of the condemned land (Finding of Fact No. 51 (page 12a); N.T. 464-465); had entered into a contract for the demolition of existing structures on the condemned land, with the demolition under that contract already being under way (Finding of Fact No. 52 (page 12a); N.T. 465); had approved plans and specifications for the public parking project, which at the time of trial were out for bids and scheduled to be considered for awards on June 28, 1962 (Finding of Fact No. 53 (page 12a); N.T. 465); and had scheduled construction of the public parking project to be completed in ten months so that it might be ready for use by the public at the height of the heavy business season in the following autumn (Finding of Fact No. 54 (pages 12, 13a); N.T. 465).†

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* Ensuing litigation between petitioner Seligsohn and the Authority with respect to the condemnation bond was carried to the Supreme Court of Pennsylvania and terminated in the Authority's favor. *Seligsohn Appeal*, 410 Pa. 270, 189 A.2d 746 (1963).

† During the interim since the commencement of this action the public parking project has been completed and was formally opened on February 22, 1964 in public ceremonies addressed by the Mayor of Philadelphia and the Chairman of the Authority. The New York Times, Sunday, February 23, 1964, Section 1, page 69; The Sunday Bulletin, February 23, 1964, Section 1, page 3; The Philadelphia Inquirer, Sunday, February 23, 1964, Section B, page 1.

ARGUMENT.

Summary of Argument.

Both of petitioner's "Questions Presented" are based on wholly erroneous hypotheses of fact.

Petitioner's first Question wrongly implies (1) that the purpose of the public parking project was simply to provide parking for customers of the respondent department stores; (2) that there was no substantial proof of public need for off-street parking in the area; (3) that the sole purpose of the project was to induce people to shop in the department stores; and (4) that the project was the result of a conspiracy to drive petitioner out of business. None of these implications is supportable, as the adjudication and opinions below demonstrate, and the entire issue of public use was peculiarly one for the state courts in the light of local conditions.

Petitioner's second Question incorrectly suggests that the courts below did not make an independent judicial inquiry as to whether the parking project was for a public purpose. Aside from petitioner's failure to raise this point in the courts below, her contention is contrary to the fact.

1. The condemnation of petitioner's property was correctly held to be for a public purpose.

The "public purpose" issue which petitioner asserts in this case is not a substantial one and does not merit review by this Court. In the trial court the Chancellor expressly held that there was a public need for off-street parking in the area (page 16a), and expressly concluded that the Authority's condemnation of the real estate was for a public use (Page 18a). Then the trial court en banc expressly concurred in those views (pages 21a-22a), and still later the Supreme Court of Pennsylvania affirmed the same conclusions per curiam (pages 24a-27a), noting with italics, for emphasis, the petitioner's public use argument, but rejecting her contention with respect

to it. (Pages 26a-27a). Thus, not only the trial court (both the Chancellor and the court en banc) but also the highest court in the state flatly disagreed with the petitioner on the primary point in the case. There was no error in this.

Preliminarily, it should be noted that this Court itself has recognized the public nature of a municipal parking authority's facilities under arrangements not greatly different from those in the present case. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961).

In the *Burton* case, before constructing the parking facility there involved, the Authority was advised by its retained experts that the anticipated revenue from the parking of cars and the proceeds from the sale of its bonds would not be sufficient to finance the construction costs of the facility. Moreover, the bonds were not expected to be marketable if payable solely out of parking revenues. To secure additional capital needed for its debt-service requirements, and thereby to make bond financing practicable, the Authority decided it was necessary to enter into long-term leases with responsible tenants for commercial use of some of the space available in the projected garage building. One such lease was made with a tenant for use of space in the building as a restaurant. This Court held that the restaurant as well as the rest of the building was dedicated to "public uses" in performance of the Authority's functions, and that accordingly the attempted exclusion of a Negro from the restaurant constituted discriminatory state action in violation of the equal protection clause of the Fourteenth Amendment.

In accord with the view taken by this Court in the *Burton* case, state appellate courts have also held that public land and facilities do not cease to be devoted to a public purpose when leased to private operators as public parking facilities. See, for example, *Camden Plaza Parking, Inc.* v. *Camden*, 16 N.J. 150, 107 A.2d 1 (1954); *Pittsburgh Public Parking Authority* v. *Board of Property Assessment, Appeals and Review*, 377 Pa. 274, 105 A.2d 165 (1954).

In addition, this Court has long recognized that the question whether the taking of property under eminent domain is for a public purpose raises an essentially *factual* issue which can be best resolved by the state courts in the light of local conditions. *Hairston* v. *Danville & Western R. Co.*, 208 U.S. 598, 607 (1908); *Rindge Co.* v. *Los Angeles*, 262 U.S. 700, 705-706 (1923); *Cincinnati* v. *Vester*, 281 U.S. 439, 446-447 (1930); and see *Allegheny County* v. *Mashuda Co.*, 360 U.S. 185, 190 (1959); *United States ex rel. Tennessee Valley Authority* v. *Welch*, 327 U.S. 546, 551-552 (1946).

In *Allegheny County*, supra, involving the taking of property for improving a municipal airport, this Court said that, "The only question for decision is the *purely factual* question whether the County expropriated the respondents' land for private rather than for public use." (360 U.S. 190.) (Emphasis added.)

In *Rindge Co.*, supra, which involved a taking for highway purposes; this Court stated (262 U.S. 705-706):

> "The nature of a use, whether public or private, is ultimately a judicial question. However, the determination of this question is influenced by local conditions; and this Court, while enforcing the Fourteenth Amendment, should keep in view the diversity of such conditions and regard with great respect the judgments of state courts upon what should be deemed public uses in any State."

In *Welch*, supra, involving condemnation of land by the Tennessee Valley Authority, the Court further observed (327 U.S. 551-552):

> "It is true that this Court did say in *Cincinnati* v. *Vester*, 281 U.S. 439, 446, that 'It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.' But the Court's judgment in that case denied the

> power to condemn 'excess' property on the ground that the state law had not authorized it. And in *Hairston* v. *Danville & Western R. Co.*, 208 U.S. 598, 607, this Court, referring to the 'rule' later stated in the *Vester* case, said that 'No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses in conformity with its laws.'"

This Court also accords great respect to legislative declarations as to what uses are considered to be public. *Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930); *United States ex rel. Tennessee Valley Authority* v. *Welch*, 327 U.S. 546, 552 (1946). This is significant in the present matter, since the Pennsylvania Legislature has explicitly provided in § 2 of the Parking Authority Law of June 5, 1947, P.L. 458, as amended (53 Purd. Stat. Ann § 342), that the statutory purposes of parking authorities "are hereby declared to be public uses for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain"; and has further expressly provided in § 5 of that Law (53 Purd. Stat. Ann. § 345) that such an authority shall have the power, inter alia, to lease land and facilities for parking purposes and to lease portions of the street level or lower floors of parking facilities for commercial use by the lessee.

In the present case, moreover, the lease from the Authority to the department stores and the Chancellor's findings show that the condemnation of the petitioner's property was for a public purpose. In this connection the following points may be particularly noted:

(a) The department stores are obligated to operate the parking project as a public parking facility in accordance with the provisions of the Parking Authority Law and are permitted to conduct only such other related activ-

ities as may be lawfully conducted therein and as shall have been approved by the Authority (Exhibit P-24, at Par. 4).

(b) The department stores must operate the parking project subject to such rules and regulations as the Authority may reasonably from time to time adopt, and must comply with all laws, acts, rules, regulations, orders and directions of any legislative, executive, administrative or judicial body applicable to the parking project (Exhibit P-24, at Par. 14).

(c) The department stores will pay to the Authority annually rental in an amount sufficient to cover the interest and amortization of the revenue bonds, plus $25,000 a year to cover the Authority's office overhead costs, plus an amount equal to 7% of the annual gross revenue of the project over $675,000 up to $775,000 and 10% of the annual gross revenue over $775,000 (Exhibit P-24, at Par. 6, 8 and 9; D-8 at pages 76-79; N.T. 462).

(d) The rentals are due and payable by the department stores in any and all events, regardless of whether the stores have the use and occupancy of the project (Exhibit P-24, at Par. 6-C).

(e) The rates and other charges for the use of the parking facility are determined by the Authority, not by the department stores, who are the lessees of the project responsible for its operation (Exhibit P-24, at Par. 13).

(f) Title to the premises is in the Authority and ultimately will vest in the City of Philadelphia (Finding of Fact No. 41 (page 11a); N.T. 382-4).

(g) The acquisition and construction program provided that the parking project was to be built pursuant to plans and specifications prepared for the Authority pursuant to an agreement it entered into with National Garages, Inc., and that construction was to be contracted for

by the Authority after public advertisement requesting bids (Exhibit P-24, at pages 25-27).

(h) The parking project is to be open to all members of the public and is to be accessible to the public from the street through six entrances at street level, as well as being accessible through the department stores by being connected to them at upper levels of the garage (Findings of Fact No. 37 and 39 (pages 10a and 11a); Exhibit P-24, at page 27).

(i) The project is financed entirely through the Authority's revenue bonds, without cost to it or the City of Philadelphia (Finding of Fact No. 42 (page 11a); N.T. 382-4).

(j) $4,500,000 of revenue bonds were sold by the Authority and the proceeds were turned over to the Trustee named in the indenture under which the bonds were sold (Finding of Fact No. 43 (page 11a)).

(k) Notwithstanding petitioner's assertion to the contrary, the department stores have not guaranteed the revenue bonds. The rentals payable by the stores pursuant to their lease with the Authority were assigned by the latter to the Trustee for the benefit of the bondholders and will be sufficient to pay principal and interest on the bonds. (Exhibit P-24, at page 37).

(l) The department stores may maintain appropriate signs on the project to invite patronage both for the garage and the stores, and to give traffic directions; and all such signs are subject to the written approval of the Authority (Exhibit P-24, at Par. 5).

(m) In keeping with the Authority's normal policy of providing for the use of first-floor space of such projects for commercial purposes, the department stores here were given the right to use or sublet such space and the appurtenant basement space for commercial purposes not forbidden by law, but the stores are required to pay all

taxes in respect of such space (Finding of Fact No. 40 (page 11a); Exhibit P-24, at Par. 4 and 11).

Respondents deem it unnecessary to specify the numerous misinterpretations of the record which appear in the petition for writ of certiorari, either expressly or by implication, in petitioner's effort to show that the purpose of the project is private. An example is petitioner's reference (page 10 of the petition) to the condemnation as having been "preceded" by the lease. In point of fact the resolution of condemnation was adopted by the Authority on February 23, 1962 and the lease was not executed until on or about March 1, 1962, although it was dated "as of" January 1, 1962 (Findings of Fact No. 34 and 48 (pages 10a and 12a)).

Another example is the petitioner's studied effort to suggest (e.g., page 4 of the petition) that the action of the Authority and the department stores was in the nature of a conspiracy to eliminate competition between petitioner (operating through Export-Import Clothing Company) and the department stores—an intimation which the Chancellor described as a rather far-fetched insinuation "without a scintilla of evidence to support it" (page 15a). As a matter of fact, although it was brought to the attention of Export-Import that space was available to it for the relocation of its business either on the ground floor of the public parking project itself, or at a nearby location on Arch Street, Export-Import gave no consideration to relocation (Finding of Fact No. 59 (page 13a); N.T. 136-138, 140-146; D-7 at pages 14, 19-20).

2. The court below made ample independent judicial inquiry into the question whether the condemnation was for a public use.

The petitioner asserts, as a second reason for allowance of a writ of certiorari, that the court below refused to make an independent judicial inquiry into the nature of the condemnation. Apparently this accusation is directed

at both the trial court and the Supreme Court of Pennsylvania. (See Petition, pages 16 and 17). However, the petitioner's contention on this point is raised for the first time in this Court; it was not made in the courts below. Although at every stage of the litigation petitioner contended that the condemnation had not been for a public purpose, she is now for the first time asserting that the court below did not make an independent judicial inquiry into that question. Even in the petition for reargument in the Supreme Court of Pennsylvania (Appendix "A" to this brief) she did not raise the issue. Accordingly, the point should not be considered here. *Beck* v. *Washington*, 369 U.S. 541, 549-550 (1962).*

Even if petitioner had raised this issue in a timely manner, it would still be without merit, because the record plainly shows that the courts below did make independent judicial inquiry into the public or private nature of the purpose of the condemnation. First, the Chancellor made his own complete and independent judicial inquiry into the question, discussed it fully in his adjudication, and came to the explicit conclusion that the condemnation was for a public purpose (pages 15a, 16a, 18a). Next, the trial court en banc made a second complete and independent judicial inquiry of the issue, reaching the same conclusion as had the Chancellor (pages 20a-22a). Finally, the Supreme Court of Pennsylvania reviewed the question and

* In addition, the petitioner has not complied with this Court's Rule 23(1)(f), which provides that where one seeks review of a state court judgment, "the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g. by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

affirmed the lower court in a per curiam opinion which took pains to note in italics, for emphasis, that one of the petitioner's arguments was that the condemnation had not been for a public use (page 26a).

In the light of the record, therefore, it is manifest that there was not merely one independent judicial inquiry into the nature of the condemnation, but in fact there were three such inquiries into the issue.

CONCLUSION.

For the foregoing reasons the petition for writ of certiorari should be denied.

HARRY SHAPIRO,
DAVID N. BRESSLER,
Attorneys for Respondent,
The Philadelphia Parking Authority

SAMUEL D. GOODIS,
BERNARD M. GUTH,
Attorneys for Respondent,
City Stores Company

JOHN R. MCCONNELL,
OSCAR M. HANSEN,
Attorneys for Respondent,
Strawbridge & Clothier

Of Counsel:

SHAPIRO, ROSENFELD, STALBERG & COOK

FOLZ, BARD, KAMSLER, GOODIS & GREENFIELD

MORGAN, LEWIS & BOCKIUS

APPENDIX "A"

PETITION FOR REARGUMENT.

To the Honorable, the Justices of the Supreme Court:

I.

PRELIMINARY STATEMENT.

The Appeal in this case was argued under very unusual circumstances. At the time of argument Your Honorable Court did not have the Briefs of the parties before it, and did not receive those Briefs until several weeks after argument. On the day of argument Your Honorable Court instructed counsel not to print the Record until he was instructed as to which portions of the Record Your Honorable Court wished to have printed. No such instructions were forthcoming, and accordingly at the time of decision the individual Justices of Your Honorable Court did not have copies of the Record before them in convenient form as an aid in their deliberations.

These unusual circumstances arose because of the unavailability of the Record from the court below in time for printing prior to the date on which the Record was due to be served upon Appellees and filed with Your Honorable Court. A resulting series of petitions, answers and motions were not resolved until the actual day of argument.

It is respectfully submitted that the lack of a printed record and the confusion resulting from the unusual petitions, motions and directions, tended to seriously obscure the basic issues presented in this rather complex piece of litigation.

This Petition prays that a Reargument be granted so that the case may be heard without extraneous confusion, and with the printed Briefs and Records in the hands of Your Honorable Court.

II.

MISAPPREHENSION AS TO THE SIGNIFICANCE OF THE ISSUES PRESENTED.

Perhaps the most perplexing and difficult area of the law today relates to the conflict between the felt needs of communities in the throes of urbanization (regarding transportation, parking, etc.), and traditional conceptions of private property rights as an incident of individual liberty. This case raises that conflict in its sharpest perspectives.

The Appellees and the Court below have taken the view that a condemnation is proper to aid private business interests when those business interests in turn benefit the economic health of the community. Appellants hold that takings of the private property of one individual for direct use by and for the primary benefit of other private persons have not heretofore been sanctioned by the courts of this Commonwealth or the other courts of this nation, and should not be.

It is respectfully submitted that the Majority Opinion of Your Honorable Court does not appear to have adequately considered the effect of its decision and the sweeping nature of the change in individual property rights which follows in the wake of that decision.

III.

MISAPPREHENSION AS TO THE NATURE OF THE WITHIN CASE.

The Per Curiam Opinion treats the instant case as if it were a purely factual one and virtually the entire Opinion is stated in the conclusionary phrase "that the Court below acted with propriety in entering this decree".

It is respectfully submitted that the basic questions presented on this appeal raise *legal and interpretive*, as distinguished from factual problems:

(1) Appellants' Brief, pages 30 through 40, deals with a problem of statutory construction not heretofore raised in any reported case in Pennsylvania: Does the Parking Authority Law limit an Authority's power of condemnation to projects which will relieve traffic congestion, or does it permit the exercise of that condemnation power when an incidental purpose is parking?

(2) Do the uncontroverted facts (the genesis of the plan, the terms of the leasing, the benefits derived, the guarantees extended, etc.) make out a taking for private purposes as a matter of law?

(3) Are certain statutory prohibitions in the Parking Authority Law contravened by the written lease in this case?

IV.

THE MAJORITY OPINION OVERLOOKED THE EVIDENTIARY QUESTIONS RAISED.

The Majority Opinion refers to the third of the three types of evidentiary rulings complained of in this case, but does not even refer, much less dispose, of the first two evidentiary questions posed:

(1) Was Appellants' Motion for Inspection of Documents properly denied? (Appellants' Brief, pages 89-99).

(2) Did the Chancellor err in admitting entire depositions of Appellees' officers upon Appellees' motion, over Appellants' objections? (Appellants' Brief, pages 99-101).

It is respectfully submitted that serious and basic questions of the operation of the Discovery Rules promulgated by Your Honorable Court are involved in this case and not disposed of.

V.

THE MAJORITY OPINION HAS NOT DEALT WITH THE CONSTITUTIONAL ISSUES POSED

Appellant has raised basic constitutional questions, both under the Pennsylvania Constitution and the Federal Constitution. Section 3 of Appellants' Brief, (pages 41-77) is headed:

> "The Eighth and Filbert Streets Project of the Philadelphia Parking Authority Is a Taking for a Private Rather Than a Public Purpose, and Is Therefore Violative of the Constitution of the United States and of the Commonwealth."

Paragraph 15 of Appellants' Complaint, the Requests for Findings, and the Exceptions in the Court below, all raise the fundamental Federal and State Constitutional questions.

Nevertheless, the Majority Opinion does not discuss the Constitutional issues raised.

It is respectfully submitted that not only are Appellants' constitutional rights seriously involved in this case, but a clarification of the constitutional rights of others similarly situated is desperately needed. The effect of the Majority Opinion as it now stands is to seriously limit the scope of heretofore recognized individual property rights.

VI.

MISAPPREHENSION AS TO SURVEYS AND STUDIES IN THIS CASE.

The Majority Opinion of Your Honorable Court notes in its recitation of facts that several surveys and studies had been made with regard to parking and that "The Authority had the benefit of such studies and surveys."

That Opinion does not appear to comprehend, however, that *the surveys and studies showed that there is no*

public need for a parking facility at 8th and Filbert Streets.

The surveys and studies were introduced into evidence by Appellants, not Appellees, because they showed that the projected *1970 need* for parking spaces in the vicinity of the project in question had already been considerably exceeded in 1962. The Center City Studies dealing with the selection of parking sites were Exhibits P-1 and P-2. The Studies dealing with the *economic* feasibility of a site at 8th and Filbert Streets were Exhibits P-3 and P-4. The relevant *uncontradicted* supply and demand statistics are set forth in Appellants' Brief at Pages 64 and 65. They reveal a 1962 surplus of between 737 and 1037 parking spaces over the projected 1970 parking demand of 2943 spaces!

Exhibits P-2 and Exhibit P-5 are the only significant studies which make recommendations for meeting parking demands between the Delaware and Schuylkill Rivers in downtown Philadelphia. Although they recommend a variety of parking projects in various areas, *they do not recommend a parking facility in the vicinity of 8th and Filbert Streets.* (A comprehensive analysis of the said studies is set forth at pages 60 through 66 of Appellants' Brief).

Furthermore, at least a majority of the Parking Authority Members when called to testify showed either complete ignorance of the matter contained in the studies and surveys (see references noted at pages 15-19 of Appellants' Brief) or made clear that the studies and surveys were not considered by them. Parking Authority Member Withington, for example, the maker of the motion to condemn, testified: (N.T. p. 153):

> "Q. Mr. Withington, did you base the selection of the 8th and Filbert site on a report or study?
>
> A. No, sir."

It is respectfully submitted that the Majority Opinion of Your Honorable Court misapprehended the fact that although the Parking Authority did have studies and surveys available to it, it completely ignored the facts and recommendations contained in them.

VII.

MISAPPREHENSION AS TO THE NEED FOR PRIVATE GUARANTORS OF PARKING AUTHORITY BONDS.

The Majority Opinion of Your Honorable Court refers to the difficulties of financing a parking authority project and the "necessity" for guarantors, as if that were a general difficulty inherent in all parking projects.

This is simply untrue. The 10th and Ludlow Parking Authority Garage, located some three blocks from 8th and Filbert, and the 19th and Walnut Parking Authority Garage, among others, have been financed by Authority bond sales without additional security supplied by department stores or any other private persons. (Deposition of Max Raab, p. 97).

It is respectfully suggested that *the reason this particular bond issue was not feasible without guarantors was that there was no public need or demand for the facilities* sufficient to assure the project's solvency. It is clear that the Lits and Strawbridge & Clothier guarantee was given and this garage constructed because of the private benefit to be gotten by those stores.

VIII.

THE FORM OF YOUR HONORABLE COURT'S DECISION.

The Opinion of Your Honorable Court is designated a Per Curiam Opinion, and yet there is a Dissenting Opinion in which three of the seven Justices of Your Honorable

Court concur attacking the basis of the Per Curiam Opinion. The effect of this unusual form of opinion is bound to create considerable confusion in a hitherto clear area of the law.

In the leading case of *Clarke* v. *Western Assurance Co.*, 146 Pa. 561, 570 (1892), 23 A. 248, 249, 15 L.R.A. 127, 28 Am. St. Rep. 821, which considered the effect of a per curiam opinion Mr. Chief Justice Paxson took pains to point out, at page 570:

> "A Per Curiam is the opinion of the court in a case in which we are all of one mind, and so clear that we do not think it necessary to elaborate it by an extended discussion."

Prior to the instant decision, this had been the law of the Commonwealth, and has been adopted by other courts in the country as *the* authoritive statement regarding the nature of a Per Curiam decision: *Minor* v. *Fike*, 93 P. 264, 77 Kan. 806; *Newmons* v. *Lake Worth Drainage Dist. for Use and Benefit of Martin, Fla.*, 87 So. 2d 49, 50.

It would seem clear in view of the tenor of the Dissenting Opinion, that the Justices of Your Honorable Court are certainly not of one mind in this case, and that the questions involved are far from clear. It is respectfully submitted that those views do in fact require elaboration by a more comprehensive and extended opinion from Your Honorable Court.

WHEREAS, Your Petitioner respectfully prays that Your Honorable Court grant a reargument on this appeal, and allow time for the printing of the Record prior thereto.

COHEN, SHAPIRO AND COHEN
By:
NATHAN B. FEINSTEIN
Attorneys for Appellants

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*

NATHAN B. FEINSTEIN, ESQUIRE, being duly sworn according to law, deposes and says that he is a member of the firm of COHEN, SHAPIRO AND COHEN, attorneys for the Appellants, and that the foregoing Petition For Reargument and statements made therein are all presented in good faith and that the said Petition is not filed for the purpose of delay.

NATHAN B. FEINSTEIN

Sworn to and subscribed before me the 21st day of October, 1963,

/s/ ELIZABETH SHARE
Notary Public.

[Copies of the Opinion of the Supreme Court of Pennsylvania and the Dissenting Opinion, which were attached to the Petition for Reargument, are not reproduced here, as they are printed in Appendix "B" to the Petition for Writ of Certiorari, at pages 24a-29a.]